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No. 406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

DISTRICT OF COLUMBIA, *Petitioner*

v.

THE WASHINGTON POST COMPANY AND WASHINGTON TIMES-HERALD, INC., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Was the petitioner, in the cases below before the United States Court of Appeals for the District of Columbia Circuit, denied a hearing in violation of the due process requirement of the Fifth Amendment of the United States Constitution?

2. Was error committed in the cases below by the District of Columbia Tax Court's permitting the respondents to take depositions and accepting the same in evidence?

3. Did the District of Columbia Tax Court, in the cases below, fail to make proper and sufficient findings of fact?

4. Is there reason for the grant of certiorari in these cases?

STATEMENT

These cases involve the application of the District of Columbia Sales and Use Tax Act (Act of May 27, 1949, c. 146, 63 Stat. 112, *et seq.*; Title 47, c. 26 and c. 27, D. C. Code 1951) with respect to comic strips and features furnished by syndicates to the respondents. (R. 69, 72, 74)

The use taxes were paid on amounts paid by the respondents to syndicates for daily comic strips furnished them in matrix form for publication. (R. 69, 72)

Artists furnished drawings to the syndicates from which were made the matrices. Under the contracts between the syndicates and the respondents, the respondents were given the right to reproduce and publish in their newspapers the work of the artists who made the drawings. The syndicates carried out these contracts by forwarding to the respondents the matrices bearing the impressions of the current sequence of the strips and the respondents used the matrices to produce a metal plate. From this metal plate the newspaper page containing the comic strips and features was printed. (R. 75)

The respondents appealed to the District of Columbia Tax Court from the assessment of use taxes against them with respect to the above transactions, contending that they fell within a statutory exemption afforded professional or personal service transactions which involved sales as inconsequential elements for which no separate charges were made. (Act of May 27, 1949, c. 146, 63 Stat. 124, Title 47, § 2701, D. C. Code 1951.) The District of Columbia Tax Court decided these cases in favor of the respondents and was affirmed, per curiam, by the United States Court of Appeals for the District of Columbia Circuit.

ARGUMENT

1.

THE PETITIONER, IN THE CASES BELOW BEFORE THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, WAS NOT DENIED A HEARING IN VIOLATION OF THE DUE PROCESS REQUIREMENT OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Petitioner alleges that it was denied a fair hearing by the United States Court of Appeals for the District of Columbia Circuit. (Pet. Brief 2, 3, 15-24, 38) Upon close examination, however, it becomes apparent that the real gist of the petitioner's complaint is simply that the Court of Appeals refused to overrule its earlier decision, in *Washington Times-Herald, Inc.* v. *District of Columbia*, 94 U.S. App. D.C. 154, 213 F. 2d 23. That case was originally argued by the petitioner before a division of the Court of Appeals. It was then reargued before the Court of Appeals *en banc* and was decided adversely to the petitioner, without dissent.

although with three judges concurring in a separate opinion.

Confronted with the *Times-Herald* case, *supra*, which case was on all fours with the cases at hand and adverse to the petitioner, the petitioner moved the Court of Appeals for an *en banc* hearing of these cases. That motion was denied by order in which all except one of the nine judges participated. When the cases came on for hearing before a division of the court, the court advised counsel for the petitioner that it could not overrule the *Times-Herald* case, *supra*, and that it would not hear argument that it should. However, the court made it clear that it would hear argument on such other contentions as petitioner might wish to make. Counsel for the petitioner thereupon submitted on the brief. Thereafter petitioner again moved the court for a hearing *en banc* and that motion was denied by order in which all except two of the nine judges participated. A few days later the division of the court, in a per curiam decision, affirmed the District of Columbia Tax Court.

Petitioner cannot contend that it was entitled to an *en banc* hearing as a matter of right. Indeed petitioner concedes that "such hearings are discretionary with the courts." (Pet. Brief 22) This was recognized by this Court in *Western Pacific R.R. Corp.* v. *Western Pacific R.R. Co.*, 345 U. S. 247. It is true that this Court in that case found error in the *en banc* procedure of the Court of Appeals for the Ninth Circuit. However, the facts in that case do not even remotely resemble the facts in the case at hand. In the *Western Pacific* case, the Court of Appeals had no established procedure for the initiating of hearings *en banc* and it appeared that counsel were not even

free to suggest an *en banc* hearing to the court. In the cases at hand there is no evidence whatsoever that the procedure followed in the United States Court of Appeals for the District of Columbia Circuit regarding *en banc* hearings is uncertain or unknown. Furthermore, petitioner, having filed two motions for hearing *en banc*, can scarcely contend that it was not permitted to suggest such a hearing.

Petitioner apparently considers that it was denied a "hearing." Two observations should be made.

First, it should be noted that petitioner alleges that counsel for petitioner was not permitted to present any argument concerning the liability of the respondents for the taxes. (Pet. Brief 12, 18) This is simply not so. All that petitioner was told by the court was that argument for an overruling of the *Times-Herald* case, *supra*, would not be heard. Counsel for the petitioner was free to make such other argument as he saw fit and waived that right by submitting on the brief. Petitioner, as pointed out in the decision of the Court of Appeals below, made the same overstatement of the court's action in his second motion for a hearing *en banc* of these cases.

Secondly, it would appear that petitioner considers the requirement of a "hearing" as synonymous with a requirement of an oral hearing. This is not the law. Due process does not require that oral argument be permitted on a question of law which lacks substance. *Federal Communications Commission* v. *W.J.R.*, 337 U. S. 265. Counsel for petitioner in the two motions filed by him for the purpose of securing a hearing *en banc* set forth his arguments for believing such a hearing advisable. Among these reasons was an

alleged conflict between the *Times-Herald* case, *supra*, and the earlier case, decided by the same court, of *Meyer* v. *Washington Times Co.*, 64 App. D.C. 218, 76 F.2d 988, *cert. denied* 295 U. S. 734. Counsel for the respondents filed oppositions to both of petitioner's motions, setting forth reasons why the alleged conflict did not exist. There is no reason to suppose that the Court of Appeals failed to consider the arguments made by petitioner and by respondents on this subject. The decision of that court not to grant an *en banc* hearing was tantamount to a refusal to overrule the *Times-Herald* case. It would have been a futile gesture for the division of the Court of Appeals to hear oral argument on the subject.

As has been pointed out, the right to a hearing is not synonymous with the right to make oral argument. Moreover, oral argument is of necessity limited, not only by rules of courts but also by the questioning of counsel by judges, and sometimes by the announcement of the court to counsel that it does not care to hear further argument or perhaps any argument on a certain point.

The petitioner, it is submitted, was afforded fair consideration of its arguments for an overruling of the *Times-Herald* case. The petitioner declined to make argument concerning other aspects of its case. Under these circumstances the petitioner cannot complain that it was denied a fair hearing.

2.

ERROR WAS NOT COMMITTED IN THE CASES BELOW BY THE DISTRICT OF COLUMBIA TAX COURT'S PERMITTING THE RESPONDENTS TO TAKE DEPOSITIONS AND ACCEPTING THE SAME IN EVIDENCE.

Both the petitioner and the respondents presented to the District of Columbia Tax Court and the Court of Appeals their views concerning depositions before the District of Columbia Tax Court. The District of Columbia Tax Court determined that the deposition procedure was authorized. The Court of Appeals in deciding these cases disposed of petitioner's complaint concerning depositions, as well as other complaints, with the single sentence: "We find no error affecting substantial rights."

No reason is seen to labor the question further. Petitioner concedes that the District of Columbia Tax Court is authorized to adopt and promulgate rules of procedure in matters for its determination. (Pet. Brief 26) Similar authority has been held to extend to the promulgating of rules governing depositions. *Anacostia & Potomac River R.R.* v. *Klein*, 8 App. D.C. 75 (1896) Pursuant to such authority the District of Columbia Tax Court did promulgate rules relating to depositions. (Rules 24 and 29) Nothing further need be said.

3.

THE DISTRICT OF COLUMBIA TAX COURT, IN THE CASES BELOW, MADE PROPER AND SUFFICIENT FINDINGS OF FACT.

The complaint of petitioner regarding findings of fact was presented to the Court of Appeals below and

was, as were other complaints of petitioner, disposed of by the single sentence: "We find no error affecting substantial rights."

The District of Columbia Tax Court found an identity between the facts in these cases and the facts in the *Times-Herald* case and quoted the Court of Appeal's discussion in that case of the applicability of the "professional and personal service" exemption from the use tax. (R. 80, 81) How, in the light of this petitioner can argue (Pet. Brief 35, 36) that the District of Columbia Tax Court made no finding that such professional or personal service transactions were involved in the cases before it we cannot understand.

4.

THERE IS NO REASON FOR THE GRANT OF CERTIORARI IN THESE CASES.

It is the exceptional case that warrants a grant of certiorari by this Court. Rule 19 of the rules of this Court sets forth illustrations of the factors which will motivate the Court in granting certiorari. It is submitted that none are here present.

Subparagraph (b) of Paragraph 1 of Rule 19 deals with the grant of certiorari in connection with the decisions of courts of appeal.

The first ground mentioned for grant of certiorari is the conflict of the decision of a court of appeals with a decision of another court of appeals. The petitioner alleges no such conflict in this case. The conflict alleged by the petitioner occurs between the *Meyer* case and the *Times-Herald* case, both decided by the same court. Even assuming the existence of

the supposed conflict, there can scarcely be any doubt that the 1954 *en banc* decision of the Court of Appeals in the *Times-Herald* case, coupled with its 1956 *en banc* refusal to reconsider that decision, takes precedence over its 1935 decision of the *Meyer* case.

Furthermore, the fact of the matter is that the alleged conflict is non-existent. The *Times-Herald* case and the cases at hand dealt with the applicability of the "professional and personal service" exemption under the District of Columbia Use Tax law; the *Meyer* case dealt with the assignability of contracts. The petitioner slides easily over this difference by stating that the facts of the *Meyer* case and the cases at hand are identical "with the exception of the question of tax liability" (Pet. Brief 11) and alleges that a "serious question" is presented as to the construction and application of the District of Columbia Sales Tax Act and the District of Columbia Use Tax Act. (Pet. Brief 37) This is pure fancy.

A further ground mentioned in Rule 19 of this Court for the grant of the writ is that the Court of Appeals has decided an important state or territorial question in a way in conflict with applicable state or territorial law. Even if we consider the District of Columbia a "state," the question raised is not one of importance. To be sure it involves a tax, and a tax of necessity affects more than one person. But the fact that a tax is involved certainly does not alone present grounds for certiorari. This is particularly true where what is involved is the applicability of an exemption which, on the face of it, must be of narrow scope.

Further grounds mentioned in Rule 19 deal with federal law and federal questions. But the application of the District of Columbia Sales and Use Tax Act presents a local rather than a federal question. This Court has stated that it will not ordinarily review decisions of the United States Court of Appeals for the District of Columbia Circuit which are based upon statutes confined in their operation to the District of Columbia. *Del Vecchio* v. *Bowers,* 296 U. S. 280 at 285. This does no more than recognize the well established fact that Congress, in levying taxes for the District of Columbia acts in the role of a local legislature. *Gibbons* v. *District of Columbia,* 116 U. S. 404.

Lastly, Rule 19 makes reference to departures from the "accepted and usual course of judicial proceedings" calling for the exercise of the Court's power of supervision. From what has already been said it is clear that there was no such departure here.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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